No. 2266

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Plaintiff in Error,

vs.

MARTINI DAVIDE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

A. S. HALSTED, Esq., 502–4 Pacific Electric Building, Los Angeles, California.

PENNEL CHERRINGTON, Esq., 502–4 Pacific Electric Building, Los Angeles, California.

For Defendant in Error:

BURT CHELLIS, Esq., 901 Higgins Building, Los Angeles, California.

CHAS. E. DONNELLY, Jr., Esq., 706 American Bank Building, Los Angeles, California.

Messrs. HARRIS & SWANWICK, 704–8 American Bank Building, Los Angeles, California. [4*]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

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*Page-number appearing at foot of page of original certified Record.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Judges of the District Court of the United States, Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, and also in the rendition of the verdict and judgment of a plea which is in the said District Court before you, between San Pedro, Los Angeles & Salt Lake Railroad Company, plaintiff in error, and Martini Davide, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, San Pedro, Los Angeles & Salt Lake Railroad Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 18th day of March next, in the Circuit [5] Court of Appeals, to be then and there held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the

United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 17th day of February, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States, the one hundred and thirty-seventh.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States, Southern District of California, Southern Division.

The above writ of error is hereby allowed.
Dated, the 17th day of February, 1913.

OLIN WELLBORN,
Judge.

I hereby certify that a copy of the within writ of error was on the —— day of ————, 1913, lodged in the clerk's office of the said District Court of the United States, Southern District of California, Southern Division for the said Defendant in Error.

————————————,
Clerk of the District Court of the United States, Southern District of California, Southern Division. **[6]**

I hereby certify that a copy of the within writ of error was on the 17th day of February, 1913, lodged in the clerk's office of the said United States District

Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,

Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy.

[Endorsed]: No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Writ of Error. Filed Feb. 17, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [7]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

To Martini Davide, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 18th

day of March, 1913, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, Southern District of California, Southern Division, in that certain action No. 1636, wherein San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against said San Pedro, Los Angeles & Salt Lake Railroad Company in said writ of error mentioned should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, Southern Division, this 17th day of February, 1913, and of the Independence of the United States the 137th.

OLIN WELLBORN,

United States District Judge for the Southern District of California, Southern Division. [8]

[Endorsed]: No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Citation on Writ of Error. Filed Feb. 17, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within Citation this 17 day of Feb. 1913. Burt Chellis, Chas. E. Donnelly Jr., and Harris & Swanwick, Solicitors for Pl. 2 Com. L. R. B. 68. [9]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Complaint for Damages.

Comes now plaintiff above named and complains of defendant and for cause of action alleges:

I.

That plaintiff is, and at all of the times hereinafter alleged has been, a citizen of the State of California, and a resident of the County of Los Angeles in the Southern Division of the Southern District of California.

II.

That defendant now is, and at all of the times hereinafter alleged has been, a corporation duly organized and existing under the laws of the State of Utah. That at all of said times defendant has been and still is doing business in the State of California.

That defendant at all of said times has been and now is engaged in commerce as a common carrier by railroad between the State of California and the State of Utah; that defendant owns and operates a line of railroad between said States; that said railroad passes through a portion of the State of

Nevada, and is operated by the defendant in said State.

III.

That upon the 25th day of April, 1911, plaintiff was, [11] and for a period of several days prior thereto had been regularly employed by defendant in the capacity of and repairing the said main line track of defendant between the stations of Las Vegas and Caliente in the State of Nevada.

IV.

That upon said date, and while plaintiff was so employed and engaged as aforesaid, plaintiff was riding upon and assisting in propelling a certain hand-car between said stations of Las Vegas and Caliente, at a point about nine miles west of Caliente, in said State of Nevada; that said hand-car at said time was owned, operated and used by defendant in connection with the care and maintenance of its said main line track, and in connection with the work in which plaintiff was engaged as aforesaid; that plaintiff in riding upon and assisting in propelling said hand-car as aforesaid was acting under and in accordance with the orders and directions of a section foreman; that said section foreman at said time was regularly employed by defendant as such section foreman in connection with said work upon defendant's said main line track.

That upon said 25th day of April, 1911, said plaintiff was, in the regular course of his employment as such sectionman, so riding upon and assisting in propelling said hand-car, another hand-car, which said last-named hand-car was owned, operated, and used

by defendant, in the care of and repairs to its said main line track, and which was being propelled by certain other employees of said defendant, ran against and struck the hand-car upon which said plaintiff was riding as aforesaid; that said hand-car struck the hand-car upon which plaintiff was riding as aforesaid with great force and violence; that the shock and collision of said hand-cars was such that plaintiff, by reason of said shock and collision, was violently thrown from the hand-car upon which [12] he was riding as aforesaid, and fell upon the track of defendant in front of said hand-car; that the wheels of said hand-car upon which said plaintiff was riding as aforesaid ran over and mangled the left hand of plaintiff; that the employees of defendant who were propelling the said hand-car, which struck the hand-car upon which plaintiff was riding, operated the same in a careless and negligent manner.

V.

That said accident was not caused by any fault or negligence on the part of said plaintiff but was caused by the negligence of said defendant and its employees as hereinbefore set forth; that when plaintiff was injured as aforesaid he was engaged in work required of him by said defendant.

VI.

That on account of said injury, plaintiff suffered great bodily pain; that said suffering continued for a long time after said 25th day of April, 1911; that on account of said injury to plaintiff it was necessary to amputate the left hand of plaintiff at the wrist.

That plaintiff's left hand was so amputated; that on account of said injury plaintiff was confined in a hospital for about five weeks; that on account of the amputation of plaintiff's left hand, as aforesaid, he will always be maimed and unable to follow his occupation or to perform many other kinds of work for which he was fitted, but, on the contrary, must be handicapped through life and compelled to fit himself for a wholly different line of work than he had been engaged in prior to said injury.

VII.

That plaintiff, at the time of his said injury, was forty-eight years of age, and prior to said injury was in good health, perfectly well, physically strong, and capable of performing severe manual labor. **[13]**

VIII.

That by reason of said injuries to said plaintiff, as here*unto*fore set forth, caused by the negligence and carelessness of the defendant, plaintiff has suffered damages in the sum of TEN THOUSAND ($10,000.00) DOLLARS.

WHEREFORE plaintiff prays judgment against defendant for said sum of TEN THOUSAND DOLLARS ($10,000.00), together with his costs herein.

BURT CHELLIS and
HARRIS & SWANWICK,
Attorneys for Plaintiff. **[14]**

State of California,
County of Los Angeles,—ss.

Martini Davide, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing Complaint; that he has read the same and knows the

contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and that as to those matters, he believes the same to be true.

[Seal] MARTINI DAVIDE.

Subscribed and sworn to before me this 19th day of June, A. D. 1911.

W. E. STOWELL,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 1636. In the Circuit Court of the United States, 9th Circuit, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, Defendant. Complaint for Damages. Received copy of the within this —— day of ————, 1911. Filed Jul. 3, 1911. Wm. M. Van Dyke. By Chas. N. Williams, Deputy Clerk. Burt Chellis and Harris & Swanwick, Attys. for Plff., Los Angeles, Cal. **[15]**

[Summons].

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Action brought in the said Circuit Court and the Complaint filed in the office of the Clerk of said Circuit Court, in the City of Los Angeles, County of Los Angeles.

The President of the United States of America, Greeting: To the San Pedro, Los Angeles and Salt Lake Railroad Company, a Corporation.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said court in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover the sum of $10,000.00 as damages for personal injuries alleged by plaintiff to have been suffered by him. Plaintiff further alleges that said injuries were caused by the negligence and carelessness of the defendant. Plaintiff further prays judgment for his costs herein; all of which more fully appears from the complaint on file [16] in this action, to which you are hereby expressly referred, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this seventh day of July, in the year of our Lord one thousand nine hundred and eleven and of our Independence the one hundred and thirty-sixth.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I hereby certify that I received the within writ on the 8 day of July, 1911, and personally served the same on the 8 day of July, 1911, be delivering to and leaving with R. G. Wells, Gen. Mgr., said defendant named therein personally, at the County of Los Angeles in said District, a certified copy thereof, to-

gether with a copy of the complaint, certified to by Wm. M. Van Dyke, attached thereto.

LEO V. YOUNGWORTH,
U. S. Marshal.
By Ervin Dingle,
Deputy.

Los Angeles, July 8, 1911.

[Endorsed]: Marshal's Civil Docket No. 1726. Original. No. 1636. [17] U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake Railroad Company, a Corporation, Defendant. Summons. Burt Chellis, Harris & Swanwick, Plaintiff's Attorney. Filed Jul. 10, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [18]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Demurrer to Complaint.

Comes now the defendant, San Pedro, Los Angeles

& Salt Lake Railroad Company, and demurs to the complaint herein, for the following reasons, to wit:

1. Said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays that it may be dismissed hence with its costs.

A. S. HALSTED,
W. F. PALMER,
Attorneys for Defendant.

I hereby certify that in my opinion the above demurrer is well founded in law.

W. F. PALMER,
Attorney for Defendant.

[Endorsed]: No. 1636. U. S. Circuit Court, Ninth District, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Demurrer. Filed Jul. 28, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. [19] Williams, Deputy Clerk. Received Copy of the Within Burt Chellis this 28th day of July, 1911. A. S. Halsted, W. F. Palmer, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitors for Defendant. [20]

At a stated term, to wit, the July Term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the Courtroom, in the City of Los Angeles, on Monday, the second day of October, in the year of our Lord one thousand

nine hundred and eleven. Present: The Honorable OLIN WELLBORN, District Judge.

[Order Overruling Demurrer, etc.]

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY,

Defendant.

This cause coming on this day to be heard on defendant's demurrer to plaintiff's complaint, J. W. Swanwick, Esq., appearing as counsel for plaintiff, and W. F. Palmer, Esq., appearing as counsel for defendant, and said demurrer having been argued by counsel for the respective parties, it is now by the Court ordered that said demurrer be, and the same hereby is, overruled, with leave to defendant to answer within twenty (20) days.

[Endorsed]: C. C. No. 1636. United States District Court, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake R. R. Co., Defendant. Copy of Order. Filed Nov. 29, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. **[21]**

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Answer.

Comes the defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, and for answer to the complaint herein, avers:

I.

That it has not sufficient information or belief to enable it to answer the allegations contained in paragraph 1 of said complaint, and basing its denial upon such ground, denies each and every allegation therein contained.

II.

It denies that the hand-car upon which it is alleged that plaintiff was riding, was being used and operated, or used or operated, in connection with the care and maintenance, or care or maintenance, of its main line of track; it denies that plaintiff was assisting in propelling a hand-car between the stations of Las Vegas and Caliente, in the State of Nevada, or at any other place; it denies that at the time of the alleged

injury of plaintiff, as mentioned in said complaint, that plaintiff was assisting in propelling said hand-car, and denies that at said time plaintiff was acting under and in accordance with, or under or in accordance with, the orders and directions, or orders or directions, of a section foreman; it denies that on the 25th day of April, 1911, or at the time of the plaintiff's alleged injury, the plaintiff was in the regular course of his employment as a section man, or at all, assisting in propelling said hand-car, and denies that [22] another hand-car, owned, or operated, or used, or owned, operated and used by defendant in the care of and repairs to, its main line of track, and which was being propelled by certain other employees of defendant, or any other persons, ran against and struck or ran against or struck, the hand-car upon which said plaintiff was riding as aforesaid; denies that any hand-car ran upon or against, or struck the hand-car upon which plaintiff was riding; denies that said hand-car, or any hand-car, struck the hand-car upon which plaintiff was riding as aforesaid, with great force and violence, or at all struck said hand-car; denies that the shock and collision, or shock or collision of said hand-cars was such that plaintiff, by reason of said shock and collision, or shock or collision, was violently, or at all, thrown from the hand-car upon which he was riding as aforesaid, and fell upon the track of defendant in front of said hand-car; denies that the wheels of said hand-car upon which plaintiff was riding, ran over and mangled or ran over or mangled, the left hand of plaintiff; denies that the employees of defendant who were pro-

pelling said hand-car, which is alleged to have struck the hand-car upon which plaintiff was riding, operated the same in a careless and negligent manner, or careless or negligent manner.

III.

Defendant denies that said accident was caused by any fault or negligence on the part of the plaintiff; denies that said accident, or any accident, to the plaintiff was caused by the negligence of said defendant, and its employees, or said defendant or its employees, as set forth in said complaint, or at all, and denies that when the plaintiff was injured as alleged in said complaint, he was engaged in work required of him by this defendant.

IV.

This defendant has not sufficient information or belief as [23] to the matters alleged in paragraphs 6 and 7 of said complaint to enable it to answer the same, and basing its denial upon such ground, denies each and every allegation therein contained.

V.

Defendant denies that the plaintiff was injured by the negligence or carelessness, or negligence or carelessness, of the defendant, and denies that by reason of any injury which the plaintiff received because of the negligence and carelessness, or negligence or carelessness, of the defendant, the plaintiff suffered damages in the sum of $10,000, or any damage whatever.

SECOND.

For a further separate answer to said complaint, defendant avers that any injuries which the plaintiff

may have received at the time and place mentioned in said complaint, were caused by, and the result of, the negligence, carelessness and recklessness of the plaintiff himself in jumping from one of the hand-cars mentioned in said complaint to the other while the same were in motion, and defendant avers that while the plaintiff was so engaged he fell between the said hand-cars and was then and there injured, without any negligence whatever on the part of this defendant or any of its employees.

THIRD.

For a further separate answer to said complaint, defendant avers that the plaintiff was playfully jumping from one of the hand-cars mentioned in said complaint to the other while said hand-cars were in motion, and defendant avers that whatever injury the plaintiff suffered, was the result of a risk which the plaintiff assumed, and was not the result of any negligence on the part of the defendant or any of its employees.

FOURTH.

For a further separate answer to said complaint, defendant avers that at the time the plaintiff suffered the injuries alleged in the complaint, if any he did so suffer, the plaintiff was not [24] engaged or employed in any act of interstate commerce, and was not performing any act for which he was employed by this defendant, and was not performing any act which he had been ordered to perform by any of the defendant's agents or servants, and the act of the plaintiff which resulted in the alleged injuries to plaintiff, was not an act of interstate commerce, nor

was either the plaintiff or defendant, at said time and place, engaged in interstate commerce, but this defendant avers that at the time said alleged injury to plaintiff occurred, plaintiff was riding upon one of defendant's hand-cars upon its railroad between Las Vegas, Nevada, and Caliente, Nevada; that said hand-cars were not engaged in carrying interstate commerce, and at no time during all of the times alleged in said complaint, were said hand-cars or either of them, or the said employees of the defendant, or either of them, engaged in transporting freight from one State to another, nor doing any other act of interstate commerce, but were employed within the State of Nevada only, and defendant avers that at the time of the alleged injury aforesaid, the said plaintiff was not engaged in any act of commerce, either interstate or intrastate, but was engaged in play of his own accord and for his own amusement, and while so engaged in such play, said plaintiff was jumping from one hand-car to another and fell between the same and so was injured, without any fault or negligence on the part of this defendant, or any or either of its employees.

WHEREFORE, this defendant prays that it may be hence dismissed with judgment for its costs, and for all other relief proper in the premises.

A. S. HALSTED.
W. F. PALMER,
Attorneys for Defendant. [25]

State of California,
County of Los Angeles,—ss.

W. H. Comstock, being first duly sworn, deposes

and says that he is the Secretary of San Pedro, Los Angeles & Salt Lake Railroad Company, the defendant in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon his information and belief, and as to those matters he believes it to be true.

W. H. COMSTOCK.

Sworn to and subscribed before me, this 12th day of October, 1911.

[Seal] FRANCIS J. MIEDING,
Notary Public.

[Endorsed]: Original. No. 1636. U. S. Circuit Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake R. R. Co., Defendant. Answer. Filed Oct. 23, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received Copy of the Within *23* this 23d day of Oct. 1911. Burt Chellis, A. S. Halsted & W. F. Palmer, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [26]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Amended Complaint.

Leave of Court being first duly had and obtained, comes now plaintiff herein and files this his Amended Complaint as follows:

I.

That plaintiff is, and at all of the times hereinafter alleged has been, a citizen of the State of California, and a resident of the County of Los Angeles in the Southern Division of the Southern District of California.

II.

That defendant now is, and at all of the times hereinafter alleged has been, a corporation duly organized and existing under the laws of the State of Utah. That at all of said times defendant has been and still is doing business in the State of California.

That defendant at all of said times has been and now is engaged in commerce as a common carrier by railroad between the State of California and the

State of Utah; that defendant owns and operates a line of railroad between said States; that said railroad passes through a portion of the State of Nevada, and is operated by the defendant in said State.

III.

That upon the 25th day of April, 1911, plaintiff was, and [27] for a period of several days prior thereto had been regularly employed by defendant in the capacity of a section-hand and was engaged in repairing the said main line track of defendant between the stations of Las Vegas and Caliente in the State of Nevada.

IV.

That upon said last-mentioned date, and while plaintiff was so employed and engaged, as aforesaid, plaintiff was riding upon and assisting in propelling a certain hand-car between said stations of Las Vegas and Caliente at a point about nine miles west of Caliente, in said State of Nevada; that said hand-car at said time was owned, operated and used by defendant in connection with the work in which plaintiff was engaged, as aforesaid; that plaintiff in riding upon and assisting in propelling said hand-car, as aforesaid, was acting under and in accordance with the orders and directions of a section foreman, that said section foreman at said time was regularly employed by defendant as such section foreman in connection with said work upon defendant's said main line track.

That upon said 25th day of April, 1911, and while plaintiff was so employed and engaged, as aforesaid, and while said plaintiff was riding upon and assist-

ing in propelling said hand-car between said stations of Las Vegas and Caliente, as aforesaid, another and different hand-car, which said last-mentioned hand-car was also at said time owned, operated and used by defendant in the care of and in making repairs to its said main line track, was being at said time propelled by defendant at a high rate of speed upon and along said main line of track in advance of and in front of the said hand-car upon which plaintiff was riding, as aforesaid; that said other hand-car, so operated at a high rate of speed, as aforesaid, passed along said main line of track in advance of and ahead of the said hand-car upon which plaintiff [28] was riding as aforesaid; that while said other hand-car was so being propelled and operated at a high rate of speed along the same main line track of defendant ahead of and in advance of the said car upon which plaintiff was riding, as aforesaid, the speed of said other hand-car, which was so being operated in advance of the said car upon which plaintiff was riding, as aforesaid, was suddenly materially slackened and lessened; that plaintiff had no means of knowing at any of said times hereinbefore mentioned, and at none of said times did know that the speed of said other hand-car which had so advanced along said main line track in front of and in advance of the said hand-car upon which plaintiff was riding, as aforesaid, would be or had been materially or at all slackened or lessened, as aforesaid. That shortly after the slackening and lessening of the speed of said other hand-car, as aforesaid, and because thereof, the said hand-car

upon which plaintiff was riding, as aforesaid, ran against and with great force and violence struck the said other hand-car which had so advanced along said main line track in advance of the said hand-car upon which plaintiff was riding, as aforesaid.

That the shock and collision of said hand-cars was such that plaintiff, by reason of said shock and collision was violently thrown from the hand-car upon which he was riding, as aforesaid, and fell upon the track of defendant in front of said last-mentioned hand-car; that the wheels of said last-mentioned hand-car, upon which plaintiff had been riding, as aforesaid, ran over and mangled the left hand of plaintiff; that the employees of defendant who were propelling the said other hand-car which had so advanced along said main line track ahead of and in front of the car on which plaintiff was riding, as aforesaid, operated the same in a careless and negligent manner, in so suddenly materially slackening and lessening the speed of said hand-car, as hereinbefore alleged. [29]

V.

Said accident was not caused by any fault or negligence on the part of said plaintiff but was caused by the negligence of said defendant and its employees as hereinbefore set forth; that when plaintiff was injured, as aforesaid, he was engaged in work required of him by said defendant.

VI.

That on account of said injury plaintiff suffered great bodily pain; that said suffering continued for a long time after said 25th day of April, 1911; that

on account of said injury to plaintiff it was necessary to amputate the left hand of plaintiff at the wrist. That plaintiff's left hand was so amputated; that on account of said injury plaintiff was confined in a hospital for about five weeks; that on account of the amputation of plaintiff's left hand, as aforesaid, he will always be maimed and unable to follow his occupation or to perform many other kinds of work for which he was fitted, but, on the contrary, must be handicapped through life and compelled to fit himself for a wholly different line of work than that he had been engaged in prior to said injury.

VII.

That plaintiff, at the time of his said injury, was —— years of age and prior to said injury was in good health, perfectly well, physically strong, and capable of performing severe manual labor.

VIII.

That by reason of said injuries to said plaintiff, as hereinbefore set forth, caused by the negligence and carelessness of the defendant, plaintiff has suffered damages in the sum of Ten Thousand ($10,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against defendant for [30] said sum of Ten Thousand Dollars ($10,000.00), together with his costs herein.

BURT CHELLIS,
HARRIS & SWANWICK,
Attorneys for Plaintiff.

State of California,
County of Los Angeles,—ss.

Martini Davide, being first duly sworn, deposes

and says: That he is the plaintiff named in the foregoing Complaint; that he has read the same and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief and that as to those matters, he believes the same to be true.

MARTINI DAVIDE.

Subscribed and sworn to before me this 27th day of November, 1912.

[Seal] WM. M. VAN DYKE,
Clerk, U. S. District Court, Southern District of California.

[Endorsed]: 1636. Original. In the United States Circuit Court, Ninth Circuit, Southern District of California. Martini Davide, Plaintiff vs. San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, Defendant. Amended Complaint. Filed November 27th 1912. Wm. M. Van Dyke, Clerk. Harris & Swanwick, Attorneys and Counselors at Law, 704 to 708 American Bank Bldg., 129 West Second Street, Los Angeles, Cal., and Burt Chellis, Attorney for Plaintiff. **[31]**

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Second Amended Complaint.

Leave of Court being first duly had and obtained, comes now plaintiff herein and files this his second amended complaint as follows: Plaintiff alleges:

I.

That plaintiff is and at all of the times hereinafter alleged has been a citizen of the State of California, and a resident of the County of Los Angeles in the Southern Division of the Southern District of California.

II.

That defendant now is, and at all of the times hereinafter alleged has been, a corporation duly organized and existing under the laws of the State of Utah. That at all of said times defendant has been and still is doing business in the State of California.

That defendant at all of said times has been and now is engaged in commerce as a common carrier by railroad between the State of California and the State of Utah; that defendant owns and operates a

line of railroad between said States; that said railroad passes through a portion of the State of Nevada, and is operated by the defendant in said State.

III.

That upon the 25th day of April, 1911, plaintiff was, and [32] for a period of several days prior thereto had been regularly employed by defendant in the capacity of a section-hand, and was engaged in repairing the said main line track of defendant between the stations of Las Vegas and Caliente in the State of Nevada.

IV.

That upon said last-mentioned date, and while plaintiff was so employed and engaged, as aforesaid, plaintiff was riding upon and assisting in propelling a certain hand-car between said stations of Las Vegas and Caliente, at a point about nine miles west of Caliente, in said State of Nevada; that said hand-car at said time was owned, operated and used by defendant in connection with the work in which plaintiff was engaged, as aforesaid; that plaintiff in riding upon and assisting in propelling said hand-car, as aforesaid, was acting under and in accordance with the orders and directions of a section foreman; that said section foreman at said time was regularly employed by defendant as such section foreman in connection with said work upon defendant's said main line track.

That upon said 25th day of April, 1911, and while plaintiff was so employed and engaged, as aforesaid, and while said plaintiff was riding upon and assisting in propelling said hand-car between said stations

of Las Vegas and Caliente, as aforesaid, another and different hand-car, which said last-mentioned hand-car was also at said time owned, operated, and used by defendant in the care of and in making repairs to its said main line track, was being at said time propelled by defendant at a high rate of speed upon and along said main line of track in advance of and in front of the said hand-car upon which plaintiff was riding, as aforesaid, that said other hand-car, so operated at a high rate of speed, as aforesaid, passed along said main line track in advance of and ahead of the said hand-car upon which plaintiff was riding, as [33] aforesaid; that while said other hand-car was so being propelled and operated at a high rate of speed along the said main line track of defendant ahead of and in advance of the said car upon which plaintiff was riding, as aforesaid, the speed of said other hand-car, which was so being operated in advance of the said car upon which plaintiff was riding, as aforesaid, was suddenly materially slackened and lessened; that plaintiff had no means of knowing at any of said times hereinbefore mentioned, and at none of said times did know that the speed of said other hand-car which had so advanced along said main line track in front of and in advance of the said hand-car upon which plaintiff was riding, as aforesaid, would be or had been materially or at all slackened or lessened, as aforesaid. That shortly after the slackening and lessening of the speed of said other hand-car, as aforesaid, and because thereof, the said hand-car upon which plaintiff was riding, as aforesaid, ran against and with great force

and violence struck the said other hand-car which had so advanced along said main line track in advance of the said hand-car upon which plaintiff was riding, as aforesaid.

That shortly thereafter another and different hand-car which was then and there owned, operated and controlled by defendant upon said main line of track ran into and collided with the said hand-car upon which plaintiff was riding, as aforesaid.

That the shock and collision of said hand-cars was such that plaintiff, by reason of said shock and collision was violently thrown from the hand-car upon which he was riding, as aforesaid, and fell upon the track of defendant in front of said last-mentioned hand-car; that the wheels of said last-mentioned hand-car, upon which plaintiff had been riding, as aforesaid, ran over and mangled the left hand of plaintiff; that the employees of defendant who were propelling the said other hand-car which had so advanced along said main line track ahead of and in front of the [34] car on which plaintiff was riding, and the employees of defendant who were propelling the said hand-car which ran into and collided with the hand-car upon which plaintiff was riding, as aforesaid, operated the said respective hand-cars in a careless and negligent manner, in so suddenly materially slackening and lessening the speed of said hand-car, as hereinbefore alleged, and in running into and colliding with the hand-car upon which plaintiff was riding, as aforesaid, respectively.

V.

Said accident was not caused by any fault or negligence on the part of said plaintiff but was caused by the negligence of said defendant and its employees as hereinbefore set forth; that when plaintiff was injured, as aforesaid, he was engaged in work required of him by said defendant.

VI.

That on account of said injury, plaintiff suffered great bodily pain; that said suffering continued for a long time after said 25th day of April, 1911; that on account of said injury to plaintiff it was necessary to amputate the left hand of plaintiff at the wrist. That plaintiff's left hand was so amputated; that on account of said injury plaintiff was confined in a hospital for about five weeks; that on account of the amputation of plaintiff's left hand, as aforesaid, he will always be maimed and unable to follow his occupation or to perform many other kinds of work for which he was fitted, but, on the contrary, must be handicapped through life and compelled to fit himself for a wholly different line of work than that he had been engaged in prior to said injury.

VII.

That plaintiff, at the time of his said injury, was —— years of age and prior to said injury was in good health, perfectly well, physically strong, and capable of performing severe [35] manual labor.

VIII.

That by reason of said injuries to said plaintiff, as hereinbefore set forth, caused by the negligence and carelessness of the defendant, plaintiff has suffered

damages in the sum of Ten Thousand ($10,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against defendant for said sum of Ten Thousand ($10,000.00) Dollars, together with his costs herein.

BURT CHELLIS,
CHAS. E. DONNELLY, Jr.,
HARRIS & SWANWICK,
Attorneys for Plaintiff.

State of California,
County of Los Angeles,—ss.

Martini Davide, being first duly sworn, deposes and says; that he is the plaintiff named in the foregoing complaint; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and that as to those matters, he believes the same to be true.

MARTINI DAVIDE.

Subscribed and sworn to before me this 29th day of November, 1912.

[Seal] WM. M. VAN DYKE,
Clerk U. S. District Court, So. Dist. of Cali.
By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: Original. No. 1636. In the Circuit Court of the United **[36]** States, Ninth Circuit, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake Railroad Company, a Corporation, Defendant. Second Amended Complaint. Re-

ceived copy of within Second Amended Complaint this 29th day of November, 1912. Pennel Cherrington, Attorney for Defendant. Filed Nov. 29, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Harris & Swanwick, Attorneys and Counselors at Law, 704 to 708 American Bank Bldg., 129 West Second St., Los Angeles, Cal., and Burt Chellis, Attorney for Plaintiff. [37]

[Verdict.]

In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY,

Defendant.

We, the jury in the above-entitled cause, find in favor of the plaintiff in the sum of $2750.00.

Los Angeles, November 29, 1912.

A. G. BARTLETT,
Foreman.

[Endorsed]: C. C. No. 1636. U. S. District Court, Southern District of California. Martini Davide vs. San Pedro, Los Angeles & Salt Lake R. R. Co. Verdict. Filed November 29th, 1912. Wm. M. Van Dyke, Clerk. [38]

[Judgment.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

C. C. No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

This cause having come on regularly for trial on the 27th day of November, 1912, being a day in the July Term, A. D. 1912, of the District Court of the United States for the Southern District of California, Southern Division, before the Court and a jury of twelve (12) men duly impaneled; Burt Chellis, Esq., and J. W. Swanwick, Esq., appearing as counsel for .plaintiff, and Pennel Cherrington, Esq., appearing as counsel for defendant, and the trial having been proceeded with on the 27th and 29th days of November, A. D. 1912, and witnesses having been sworn and examined and documentary evidence having been produced on behalf of the respective parties, and the evidence having been closed, and the cause, after argument by the respective parties and the instructions of the Court, having, on said 29th day of November, 1912, been submitted to the jury, and the jury, on said 29th day of November, 1912, having rendered the following Verdict:

"In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1636.

MARTINI DIVIDI,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY,

Defendant.

We, the jury in the above-entitled cause, find in favor of the plaintiff in the [39] sum of $2750.00.

Los Angeles, November 29, 1912.

A. G. BARTLETT,
Foreman."

And the Court having ordered that Judgment be entered herein in accordance with said verdict in favor of the plaintiff and against the defendant in the sum of Two Thousand Seven Hundred and Fifty Dollars ($2750.00);

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Martini Davide, plaintiff herein, have and recover of and from the San Pedro, Los Angeles and Salt Lake Railroad Company, defendant herein, the sum of Two Thousand Seven Hundred and Fifty Dollars ($2750.00), together with his,

said plaintiff's, costs and disbursements in this behalf taxed at $72.10.

JUDGMENT entered November 29th, 1912.

WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: C. C. No. 1636. United States District Court, Southern District of California, Southern Division, Martini Davide, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake Railroad Company, a Corporation, Defendant. Copy of Judgment. Filed Nov. 29, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [40]

Certificate of Clerk U. S. District Court to Judgment-roll, etc.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

C. C. No. 1636.

MARTINI DAVIDE,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, a Corporation,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a

true copy of the Judgment entered in the above-entitled action and recorded in Judgment Book No. 2 of said court for the Southern Division, at page 180 thereof, and I further certify that the foregoing papers hereto annexed, constitute the judgment-roll in said action.

Attest my hand and the seal of said District Court, this 29th day of November, A. D. 1912.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: C. C. No. 1636. In the District Court of the United States for the Southern District of California, Southern Division. Martini Davide vs. San Pedro, Los Angeles & Salt Lake Railroad Company. Judgment-roll. Filed November 29th, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Judgment Register, Book No. 1, Page 180. [41]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY, a Corporation,
Defendant.

Stipulation [That Answer to Complaint Stand as Answer to Second and Last Amended Complaint, etc.].

It is hereby stipulated that the defendant's answer to the original complaint in the above-entitled action may stand as its answer to the plaintiff's second and last amended complaint, and that any new matter in said second and last amended complaint be deemed denied.

Dated November 29th, 1912.

BURT CHELLIS,
CHAS. E. DONNELLY, Jr.,
HARRIS & SWANWICK,
Attorneys for Plaintiff.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., Defendant. Stipulation. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [42]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

This cause coming on regularly for trial on the 27th day of November, 1912, before the Honorable OLIN WELLBORN, Judge of the above-named court, and a jury duly impaneled and sworn, Mr. Burt Chellis and Mr. Charles E. *Donley* appearing for the plaintiff, and Pennel Cherrington appearing for the defendant, the following proceedings were had and testimony taken:

[Testimony of Martini Davide, the Plaintiff, in His Own Behalf.]

MARTINI DAVIDE, the plaintiff, being first duly sworn, testified on his own behalf as follows:

I live at 703 San Fernando Street, Lost Angeles. It is 19 months since I have done any work; that is, since I lost my hand. When I lost my hand I was working for the Salt Lake road ballasting the track of the main line in Nevada, about 8 miles from Caliente. There were 50 or 60 other men working with me in the gang. On that night I think we quit work before 5 o'clock and were returning to camp on

(Testimony of Martini Davide.)

hand-cars. There were 7 cars; I was on the third car from the front with 5 or 6 other men. The foreman was on the first car, and the second one was loaded with Mexicans. I think we had gone 5 or 6 miles before the accident happened. We were going along pretty fast; we were pumping pretty fast, and we hit another car in front of us, and the jerk tore me off the car, and I fell on the [43] side; the car jumped the track and crushed my hand. I was standing with my back to the other car, the car in front of me. I didn't see it before we bumped into it. No one warned me of any collision. I was taken to Caliente and my hand was cut off by the company's surgeon. After that I came to Los Angeles, because I had been here before the accident. I was taken to the hospital where I stayed 39 days. At the time I left the hospital my arm was not well; it still hurt me; it always hurts me. The boss sent me on that hand-car to drive it back to camp. Since then I have not been able to work. The accident happened on the 23d day of April, 1911.

[Testimony of Antonio Medrano, for Plaintiff.]

ANTONIO MEDRANO, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

I am acquainted with the plaintiff, and first met him about two weeks before he was hurt. We had been working together a couple of days before the accident. I saw the accident. In coming back to the camp that night, we had 6 or 7 hand-cars. I was on the second hand-car facing towards the following

(Testimony of Antonio Medrano.)

car on which the plaintiff was, that is, the third car. He had his back towards me. Just before the accident some of the cars were going slow and some were not. There were some that had enough force to go, they were traveling fast. The car I was on was running quite fast a short time before the accident. When we were coming into the tunnel we were coming fast, about halfway in the tunnel, but when we came out of the tunnel we were not coming very fast. The collision took place outside of the tunnel.

Q. How was the speed of the car at the time of the accident compared with the speed a short time before the accident—the car that he was on?

The INTERPRETER.—You are referring to his car?

Mr. CHELLIS.—His car. [44]

A. I am not able to say.

Q. Well, was it faster or slower?

A. Their car was—were traveling faster than mine—if that is what you refer to. That is what he says.

Q. No, it is not; I want to find out whether his car slowed down at the time of the accident, slower than it was going before that or whether it went faster, if we can find out. I don't know just how to do it with this witness.

The COURT.—Well, that is a question that should elicit an answer. Did it slow down or did it accelerate its speed at the time of the accident? Is that what you want to know?

The INTERPRETER.—If you will always put

(Testimony of Antonio Medrano.)
your questions in the first person.

Mr. CHELLIS.—All right.

Q. Did your car slow down or increase its speed at the time of the accident?

A. It was going slow.

My car was traveling slow at the time of the accident. I saw Davide at the time of the accident, when he fell. When we came out of the tunnel we were traveling very slow because we could not go fast on account we didn't have enough power, and when we got about eleven meters out of the tunnel, the other car came and hit us and knocked our hand-car about 11 meters ahead; then the fourth car came and collided with the third. There were two collisions; it was the collision of the fourth car with the third that threw Davide off. I saw Davide fall.

At this point the defendant admitted that the plaintiff's hand was injured by the collision so that it had to be amputated. It was also here admitted that the plaintiff was riding with his back towards the car preceding it.

On cross-examination the witness testified: Eleven meters would be about 55 feet. We were riding on a hand-car which was [45] propelled by no other kind of power than the physical hand-power of the men on the car.

[Testimony of Ricardo Reyes, for Plaintiff.]

RICARDO REYES, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

I was working with Davidi at the time of the accident, and had been for about ten days. I was on the

(Testimony of Ricardo Reyes.)

second car and was facing the rear. Davidi was on the following car and had his shoulder towards us. At the time of the accident our car was running slow; as we came out of the tunnel we were tired and were traveling slow. I didn't see Davidi's car while we were in the tunnel, but saw it outside. When I first saw it, it was about thirty feet from our car, but I can't say exactly how far it was. When we were coming out of the tunnel their hand-car came in collision with ours, then, as ours went ahead, the one following Davidi's car came and hit his car, and that was the time he fell. It was the fourth car that struck his and caused him to fall.

Plaintiff here rests.

Mr. CHERRINGTON.—The defendant moves the Court to grant a motion for a nonsuit, on the ground of insufficiency of the evidence to support any verdict, taking the pleadings in any light, either the amended complaint, or as lastly amended.

Which said motion was overruled by the Court, and an exception taken by the defendant to such ruling.

Defendant's Testimony.

[Testimony of Hugh O'Brien, for Defendant.]

HUGH O'BRIEN, a witness called on behalf of defendant, being first duly sworn, testified as follows:

At the time of plaintiff's injury, I was foreman of the gang [46] he was working in. I had about eighty men. Used seven or eight cars, sometimes nine, in transferring the men back and forth. The accident occurred at the east switch at Stine, which is a station in Nevada, and about 500 feet east of the

(Testimony of Hugh O'Brien.)

west switch—that would be this side of Stine; that is, the men would have gone by the switch about 500 feet on their way to Caliente. I don't know what car the plaintiff was on. I was on the front car; I always ride on the front car in order to protect the men behind me against trains that might be coming in the opposite direction. I always instructed the men to run the cars not closer than 300 feet. Before the accident I directed the men where to put the cars on the track, but at the time of the accident I don't know what the men on the cars behind me were doing. According to my best judgment, I think the west switch at Stine was from 800 to 1,000 feet from the tunnel that has been testified about, though I don't know the exact distance. I think likely the accident happened about 1,500 feet from the tunnel.

Mr. CHERRINGTON.—I now desire to read in evidence a deposition of Steve Bonich, taken pursuant to stipulation.

The COURT.—Just read it.

[Deposition of Dan Zupon, for Defendant.]

DAN ZUPON, a witness called on behalf of defendant, being first duly sworn, testified as follows, by deposition:

I know Martini Davide. On the 25th of April, 1911, he was working with me near Stine station in Nevada, for the San Pedro, Los Angeles & Salt Lake Railroad Company. We were working about ten miles west of Caliente. We had about 100 men in the gang. I remember the accident in which Martini Davide had his hand cut off. It was in the evening.

(Deposition of Dan Zupon.)

We were engaged on that day ballasting the track. We were on our way home after quitting work for the day. We were going home on hand-cars. I was riding on the fifth hand-car from the front, and Davide was also on the fifth [47] car. The fourth and fifth cars were running about four feet apart, and then came as close as they could get. The foreman was on the front car; he was between 14 and 15 rails ahead of us; a rail is 33 feet. The foreman had nothing to do with the running of the car I was on. When Davide got hurt he was riding on the handle; then he was playing with the Mexican on the fourth car without holding on to anything. The cars were going as fast as they could pump, between nine and ten miles an hour. Davide fell because he was not holding on to the handle of the hand-car, and he was joshing with the Mexican on the car in front, and the Mexican started to run faster, then Davide fell between the cars. We stopped the hand-car in about a minute; it ran about a rail and a quarter. There were five men on my hand-car.

[Deposition of Steve Bonich, for Defendant.]

STEVE BONICH, a witness called on behalf of defendant, being first duly sworn, testified as follows by deposition:

I have known Martini Davide about two months before the 25th of April, 1911, and was working with him ballasting track that day. We were working about thirty miles west of Caliente. There were from 95 to 100 men in the gang. I remember Davide getting hurt; he was on the way home; it was after

(Deposition of Steve Bonich.)

six o'clock when we quit work. Davide was on the same car I was on. There were seven cars and we were riding on the fifth from the front. At the time Davide was hurt the fourth and fifth cars were together, and Davide put his hand around to the Mexican, and was joshing with the Mexican, tickling him, playing with him. When the hand-cars got together Davide put one leg on the fourth hand-car and one on his own car, but didn't hold on to anything. The Mexican whom he tickled was on the fourth car, that is, the car in front of us. The cars were going like when they go between [48] six and seven miles an hour. Davide fell off the car. It was the fifth car that ran over him and cut his hand off. We stopped the car within a half rail. There were five men on our car. The foreman was riding on the first car.

Defendant rests.

Rebuttal Testimony.

[Testimony of Antonio Medrano, for Plaintiff (Recalled in Rebuttal).]

ANTONIO MEDRANO, recalled on rebuttal, testified as follows:

At no time, except at the time of the collision, were the car that I was on and the car that Davide was on near enough for a man to stand with one foot on each car, and Davide did not do that.

[Testimony of Ricardo Reyes, for Plaintiff (Recalled in Rebuttal).]

RICARDO REYES, recalled on rebuttal, testified as follows:

Except at the time of the collision, the cars were not close enough for Davide to stand with one foot on each car. He was standing on his own car and at no time stood with a foot on both. At no time was Davide playing with or tickling a Mexican on our car. I don't remember Dan Zupon or Steve Bonich. I don't mean to say, however, that they were not working with my gang.

[Testimony of Martini Davide, the Plaintiff, in His Own Behalf (Recalled in Rebuttal).]

MARTINI DAVID*I,* recalled on rebuttal, testified as follows:

I don't know Steve Bonich; I didn't have time to know anybody; I was there only twelve days. I didn't know Dan Zupon either. I didn't know the names of the men on the car with me because they were all Austrians. I never stood with one foot on one car and one on the other. At the time of the accident I was not playing with a Mexican or anybody else on the other car. I don't mean to say that Zupon and Bonich were not working with me that day. All I know is that I knew one Mexican that had two fingers off. [49]

Thereupon counsel for the defendant requested the Court, in writing, to give to the jury the following instructions:

Defendant's Requests for Instructions.

(Title of Court and Cause.)

Exception No. 1.

The defendant requests the Court to instruct the jury to return a verdict in favor of the defendant, for the reason that the evidence is insufficient to support a verdict in favor of the plaintiff, no evidence of negligence on the part of the defendant having been shown.

Which said instruction the Court refused to find, and to the refusal of the Court to find the same, the defendant duly excepted.

Exception No. 2.

Defendant also requests the Court to instruct the jury to find a verdict in favor of the defendant on the further ground that at the time of the accident in question, neither the defendant nor the plaintiff were engaged in interstate commerce.

Which said instruction the Court refused to find, and to the refusal of the Court to find the same, the defendant duly excepted.

Exception No. 3.

The fact that the hand-cars came in collision and the plaintiff Davide was injured thereby raises no presumption whatever that the defendant or its employees were negligent.

Which said instruction the Court refused to find, and to the refusal of the Court to find the same, the defendant duly excepted.

Exception No. 4.

Before you find a verdict for the plaintiff, you must believe from the greater weight of the evidence introduced that the defendant [50] was guilty of the negligence set up by the plaintiff, so that if you find that the greater weight of the evidence is in favor of the defendant, or if it is equally balanced, your verdict must be for the defendant, and in this connection you are instructed that the occurrence of the collision is of itself no evidence of such or any negligence whatever.

Which said instruction the Court refused to find, and to the refusal of the Court to find the same, the defendant duly excepted.

Whereupon the Court gave to the jury the following instructions:

Instructions of the Court to the Jury.

Gentlemen of the Jury: I will now read you the instructions of the Court.

The plaintiff sues to recover damages, laid in the complaint at ten thousand dollars, for personal injuries to himself, which he alleges were caused by defendant's negligence.

The plaintiff's complaint, after alleging defendant's corporate existence and its ownership and operation of a railroad between the States of California and Utah, and plaintiff's employment by defendant in the capacity of a section-hand, engaged in repairing the main line of track of defendant between Las Vegas and Caliente in the State of Nevada, proceeds as follows:

"That upon the 25th day of April, 1911, plaintiff was, and for a period of several days prior thereto had been regularly employed by the defendant in the capacity of a section-hand, and was engaged in repairing the said main line track of defendant between the stations of Las Vegas and Caliente in the State of Nevada.

"That upon said last mentioned date, and while plaintiff was so employed and engaged, as aforesaid, plaintiff was riding upon and assisting in propelling a certain hand-car between said stations of Las Vegas and Caliente, at a point nine miles west of [51] Caliente, in said State of Nevada; that said hand-car at said time was owned, operated and used by defendant in connection with the work in which plaintiff was engaged, as aforesaid; that plaintiff in riding upon and assisting in propelling said hand-car, as aforesaid, was acting under and in accordance with the orders and direction of a section foreman; that said section foreman at said time was regularly employed by defendant as such section foreman in connection with said work upon defendant's said main line track.

"That upon said 25th day of April, 1911, and while plaintiff was so employed and engaged, as aforesaid, and while said plaintiff was riding upon and assisting in propelling said hand-car between said stations of Las Vegas and Caliente, as aforesaid, another and different hand-car, which said last mentioned hand-car was also at said time owned, operated and used by defendant in the care of and in

making repairs to its said main line track, was being at said time propelled by defendant at a high rate of speed upon and along said main line of track in advance of and in front of the said hand-car upon which plaintiff was riding, as aforesaid; that said other hand-car, so operated at a high rate of speed, as aforesaid, passed along said main line track in advance of and ahead of the said hand-car upon which plaintiff was riding, as aforesaid, that while said other hand-car was being so propelled and operated at a high rate of speed along the said main line track of defendant ahead of and in advance of the said car upon which plaintiff was riding, as aforesaid, the speed of said other hand-car, which was so being operated in advance of the said car upon which plaintiff was riding, as aforesaid, was suddenly materially slackened and lessened; that plaintiff had no means of knowing at any of said times hereinbefore mentioned, and at none of said times did he know that the speed of said other hand-car which had so advanced along said main line track [52] in front of and in advance of the said hand-car upon which plaintiff was riding, as aforesaid, would be or had been materially or at all slackened or lessened, as aforesaid. That shortly after the slackening and lessening of the speed of said other hand-car, as aforesaid, and because thereof, the said hand-car upon which plaintiff was riding as aforesaid, ran against and with great force and violence struck the said other hand-car which had so advanced along said main track in advance of the said hand-car upon which plaintiff was riding, as aforesaid,

"That shortly thereafter another and different hand-car which was then and there owned, operated and controlled by defendant upon said main line of track ran into and collided with the said hand-car upon which plaintiff was riding, as aforesaid.

"That the shock and collision of said hand-cars was such that plaintiff, by reason of said shock and collision, was violently thrown from the hand-car upon which he was riding, as aforesaid, and fell upon the track of defendant in front of said last mentioned hand-car; that the wheels of said last mentioned hand-car, upon which plaintiff had been riding, as aforesaid, ran over and mangled the left hand of plaintiff; that the employees of defendant who were propelling the said other hand-car which had so advanced along said main line track ahead of and in front of the car on which plaintiff was riding, and the employees of defendant who were propelling the said hand-car which ran into and collided with the hand-car upon which plaintiff was riding, as aforesaid, operated the said respective hand-cars in a careless and negligent manner, in so suddenly materially slackening and lessening the speed of said hand-car, as hereinbefore alleged, and in running into and colliding with the hand-car upon which plaintiff was riding, as aforesaid, respectively.

"Said accident was not caused by any fault or negligence on the part of said plaintiff but was caused by the negligence of said defendant and its employees as hereinbefore set forth; that when [53] plaintiff was injured, as aforesaid, he was engaged in work required of him by said defendant."

The answer admits defendant's corporate existence, its ownership and operation of the railroad and its employment of plaintiff but denies all the other allegations of the complaint.

Said answer also set up as a further and separate defense that plaintiff's injuries were caused by, "and the result of, the negligence, carelessness and recklessness of the plaintiff himself in jumping from one of the hand-cars mentioned in said complaint to the other while the same were in motion, and defendant avers that while plaintiff was so engaged he fell between the said hand-cars and was then and there injured, without any negligence whatever on the part of this defendant or any of its employees."

Said answer further avers, "that the plaintiff was playfully jumping from one of the hand-cars mentioned in said complaint to the other while said hand-cars were in motion, and defendant avers that whatever injury the plaintiff suffered was the result of a risk which the plaintiff assumed, and was not the result of any negligence on the part of defendant or any of its employees."

Said answer further avers that plaintiff, at the time of the accident, was not engaged in any act of interstate commerce and was not performing any act for which he was employed by this defendant, "but was engaged in play of his own accord and for his own amusement, and while so engaged in such play was jumping from one hand-car to another and fell between the same and so was injured, without any fault or negligence on the part of this defendant or any or either of its employees."

The first issue to which the Court directs your attention is, was the defendant negligent?

In order to recover under the pleadings in this case, plaintiff must show that the defendant's employees were negligent as charged in the complaint, and, that such negligence was a proximate [54] cause of plaintiff's injuries.

If none of said employees were negligent, or if any of them were negligent but such negligence was not a proximate cause of plaintiff's injuries, no recovery can be had.

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent man would not do. It is not intrinsic or absolute, but always relates to some circumstance of time, place or person.

On this issue the Court instructs you that the mere happening of the accident raises no presumption that the defendant corporation was negligent, but the burden of proving negligence, by a preponderance of evidence, is upon the plaintiff, and the negligence, if any is proven, must be that alleged in the complaint, and, unless such negligence is so proven, your verdict must be for the defendant.

The Court further charges you, that contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, concurring and co-operating with the negligent act or acts of the defendant, was a proximate cause of the injury complained of by the plaintiff.

An act is the proximate cause of any event which, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result.

The Court further charges you that section 1 of an act of Congress, passed April 22, 1908, provides, among other things that every common carrier by railroad, while engaged in commerce between any of the several States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of [55] such carrier, or by reason of any defect of inefficiency due to its negligence in its appliances, machinery, track, roadbed, works or other equipment.

It is admitted in this case that at the time of the accident complained of the defendant Salt Lake Railroad Company was a common carrier by railroad, engaging in commerce between several States, and the Court charges you that upon the admitted facts of the case the plaintiff was employed by such carrier in such commerce.

If the evidence fails to satisfy you that any of defendant's employees were negligent as charged in the complaint, or if you believe from the evidence that either of them was negligent, but the evidence fails to satisfy you that such negligence was a proximate cause of plaintiff's injuries, your verdict will be for the defendant.

If, however, you believe from the evidence that any of defendant's employees were negligent, as

alleged in the complaint, and that such negligence was a proximate cause of plaintiff's injuries, your verdict will be for the plaintiff.

If you find for plaintiff, it will be your duty to assess the amount of damages he is entitled to recover, and in estimating those damages you may consider that the nature and extent to which the injuries he received are permanent in their nature and will affect his health and physical condition in the future, and also his bodily pain and suffering, if any, which has or will proximately, that is naturally, and without the intervention of some other cause, result from any injury received by him as charged in the complaint, and allow him such damages, not exceeding the amount alleged in the complaint, as, in your opinion, will fairly compensate him for all the pain and injury, if any, which he has sustained or will sustain by reason of said injuries. [56]

The Court further charges you, however, that if you find for the plaintiff, but also find that he was guilty of contributory negligence, you will diminish the damages you find the plaintiff has sustained by reason of his injuries in proportion to the amount of negligence attributable to the plaintiff.

And the Court gave to the jury no further or other instructions.

Exception No. 5.

"An act is the proximate cause of an event when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result."

To which instruction the defendant then and there excepted.

Exception No. 6.

The defendant then and there excepted to that part of the instruction of the Court, which was as follows:

"And the Court charges you that, upon the admitted facts of the case, the plaintiff was employed by such carrier in such commerce."

Exception No. 7.

"If, however, you believe from the evidence that any of defendant's employees were negligent as alleged in the complaint, and that such negligence was a proximate cause of plaintiff's injuries, your verdict will be for the plaintiff."

To which instruction the defendant then and there excepted.

Exception No. 8.

"The Court further charges you, however, that, if you find [57] for the plaintiff, but also find that he was guilty of contributory negligence, you will diminish the damages which you find the plaintiff has sustained by reason of his injuries in proportion to the amount of negligence attributable to the plaintiff."

To which instruction the defendant then and there excepted.

And thereupon the jury returned a verdict in favor of the plaintiff, in words and figures as follows:

(Title of court and cause omitted.)

"We, the jury in the above-entitled cause, find in favor of the plaintiff in the sum of $2750.00.

Los Angeles, November 29, 1912.

A. G. BARTLETT,
Foreman."

The foregoing, containing all the evidence offered at the trial in said cause, all of the defendant's requests for instructions to the jury, together with the defendant's exceptions to the Court's refusal to give said instructions, and the instructions of the Court to the jury, with the defendant's exceptions thereto, and containing all of the proceedings on the trial of said cause, to and including the verdict of the jury, is hereby offered as the defendant's proposed Bill of Exceptions.

A. S. HALSTED and
PENNEL CHERRINGTON,
Attorneys for Defendant.

Service of the foregoing Bill of Exceptions accepted, and a copy thereof received, this 24th day of December, 1912.

BURT CHELLIS,
HARRIS & SWANWICK,
Attorneys for Plaintiff. [58]

It is hereby stipulated that the foregoing Bill of Exceptions is a true and correct Bill of Exceptions, and that the same may be settled and allowed by the Court.

Dated, this 30th day of December, 1912.

BURT CHELLIS,
HARRIS & SWANWICK,
Attorneys for Plaintiff.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Bill of Exceptions, containing all of the evidence offered and introduced at the trial of said cause, together with the defendant's requests for instructions to the jury and the defendant's exceptions to the Court's refusal to give said instructions, and the instructions of the Court to the Jury, together with the defendant's exceptions to said instructions, and containing all of the proceedings in said cause, to and including the verdict of the jury, is a true and correct Bill of Exceptions, and is hereby settled and allowed, and ordered to be filed.

Dated this 30th day of Dec. 1912.

OLIN WELLBORN,
Judge.

[Endorsed]: Original. No. 1636. U. S. District Court Ninth District Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Bill of Exceptions. Filed Dec. 30, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. A. S. Halsted, Pennel Cherrington, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitors for Defendant. [59]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Petition for a Writ of Error and Supersedeas.

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 29th day of November, 1912, comes now by Pennel Cherrington, its attorney, and files herewith an assignment of error, and petitions said Court for an order allowing said defendant to procure a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the termination of said writ of error by the said United

States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated February 15th, 1913.

PENNEL CHERRINGTON,
Attorney for Petitioner.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth [60] District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Petition for Writ of Error and Supersedeas. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within Petition this 15th day of Feb. 1913. Burt Chellis, Chas. E. Donnelly, Jr., Harris & Swanwick, Solicitors for Plff. Pennel Cherrington, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [61]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, and files the fol-

lowing assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, petition for which writ of error is filed at the same time with this assignment of error.

I.

That the trial Court erred in overruling and denying the defendant's motion for a nonsuit.

II.

That the trial Court erred in refusing to direct the jury to return a verdict in favor of the defendant as requested by its request for instruction numbered one because of the insufficiency of the evidence to support a verdict in favor of the plaintiff.

III.

That the trial Court erred in refusing to instruct the jury to return a verdict in favor of the defendant on the ground that at the time of the accident in question, neither the defendant nor the plaintiff were engaged in interstate commerce, as requested by defendant in its request for instruction numbered two.

IV.

That the trial Court erred in refusing to instruct the jury that the fact that the hand-cars in question came in collision and the plaintiff Davide was injured thereby, raises no presumption **[62]** whatever that the defendant or its employees were negligent, as requested by defendant in its request for instruction numbered three.

V.

That the trial Court erred in refusing to instruct

the jury as follows, on request of the defendant in its request for instruction numbered four:

Before you find a verdict for the plaintiff, you must believe from the greater weight of the evidence introduced that the defendant was guilty of the negligence set up by the plaintiff, so that if you find that the greater weight of the evidence is in favor of the defendant, or if it is equally balanced, your verdict must be for the defendant, and in this connection you are instructed that the occurrence of the collision is of itself no evidence of such or any negligence whatever.

VI.

That the trial Court erred in instructing the jury as follows:

An act is the proximate cause of an event when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result.

VII.

That the trial Court erred in instructing the jury as follows:

And the Court charges you, that, upon the admitted facts of the case, the plaintiff was employed by such carrier in such commerce.

VIII.

That the trial Court erred in instructing the jury as follows:

If, however, you believe from the evidence that any of defendant's **[63]** employees were negligent as alleged in the complaint, and, that such neg-

ligence was a proximate cause of plaintiff's injuries, your verdict will be for the plaintiff.

IX.

That the trial Court erred in instructing the jury as follows:

The Court further charges you, however, that, if you find for the plaintiff, but also find that he was guilty of contributory negligence, you will diminish the damages which you find the plaintiff has sustained by reason of his injuries in proportion to the amount of negligence attributable to the plaintiff.

X.

That the trial Court erred in overruling and denying the defendant's motion for a new trial.

PENNEL CHERRINGTON,
Attorney for Defendant.

And upon the foregoing assignment of errors and upon the record in said cause, the defendant prays that said verdict and judgment be reversed.

Dated February 15th, 1913.

PENNEL CHERRINGTON,
Attorney for Defendant.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Assignment of Errors. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within Assignment of Errors this 15th day of Feb. 1913. Burt Chellis, Chas. C. Donnelly, Jr., Harris & Swanwick, Solicitors for Plff. Pennel Cherrington, 502–4 Pacific

Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. **[64]**

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Order Staying Proceedings.

The defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, having this day filed its petition for a writ of error from the verdict and judgment made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having this day been duly allowed:

NOW, THEREFORE, it is ordered that upon said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Three Thousand Five Hundred Dollars ($3,500.00), to the effect that

if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the Clerk of this Court, that all further proceedings in this Court be and they are hereby suspended and stayed until the determination of said writ of error by said United **[65]** States Circuit Court of Appeals.

Dated February 15th, 1913, at Chambers.

OLIN WELLBORN,
Judge.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Order Staying Proceedings. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within order this 15th day of Feb. 1913. Burt Chellis, Chas. C. Donnelly, Jr., Harris & Swanwick, Solicitors for ———. Pennel Cherrington, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. **[66]**

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

Upon motion of Pennel Cherrington, attorney for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the verdict and judgment heretofore entered herein.

Dated February 15th, 1913, at Chambers.

OLIN WELLBORN,

Judge.

[Endorsed]: Original. C. C. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Order Allowing Writ of Error. Filed Feb. 15, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within order this 15th day of Feb. 1913. Burt Chellis, Chas. C. Donnelly, Jr., Harris & Swanwick, Solicitors for Plff. Pennel Cherrington, 502–4 Pacific Electric

Bldg., Los Angeles, Cal., Solicitor for Defendant.
[67]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto Martini Davide, the plaintiff above named, in the sum of Three Thousand Five Hundred Dollars ($3,500.00), to be paid to said Martini Davide, to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals, and dated this 17th day of February, A. D. 1913.

WHEREAS, the above-named defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, has issued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by

the District Court of the United States, Southern District of California, Southern Division, rendered and entered in said cause on the 29th day of November, 1912.

NOW, THEREFORE, the condition of this obligation is such that if the above-named San Pedro, Los Angeles & Salt Lake Railroad Company shall prosecute said writ to effect, and answer all costs and damages if it shall fail to make good its plea, then [68] this obligation shall be void, otherwise to remain in full force and effect.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,
By H. C. NUTT,
Its General Manager.

NATIONAL SURETY COMPANY.
CHAS. SEYLER, Sr.,
Resident Vice-president.
[Seal] H. EVERETT CHARLTON,
Resident Assistant Secretary.

General Office for So. California, 264–5–6, I. W. Hellman Bldg., Los Angeles, California.
CHAS. SEYLER, Jr.,
General Agent. [69]

AFFIDAVIT, ACKNOWLEDGMENT, AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY.

State of California,
County of Los Angeles,—ss.

On this seventeenth day of February, one thousand nine hundred and thirteen, before me personally

came Chas. Seyler, Sr., known to me to be the Resident Vice-president of the National Surety Company, the corporation described in and which executed the within and foregoing bond of San Pedro, Los Angeles and Salt Lake Railroad Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of Los Angeles, State of California; that he is the Resident Vice-president of said company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within bond of San Pedro, Los Angeles and Salt Lake Railroad Company is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-president of said company, and that he is acquainted with H. Everett Charlton and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said H. Everett Charlton subscribed to said Bond is in the genuine handwriting of said H. Everett Charlton, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever by more than the sum of Seven Thousand ($7,000) *0000* Dollars.

That Frank L. Gilbert is our agent to acknowledge service in the Judicial District wherein this bond is given.

CHAS. SEYLER, Sr.

(Deponent's signature.) [70]

Sworn to, acknowledged before me, and subscribed in my presence this seventeenth day of February, 1913.

[Notarial Seal] HAZEL JONES,

(Officer's signature, description and seal)

Notary Public in and for the County of Los Angeles, State of California.

Approved.

OLIN WELLBORN,

Judge.

[Endorsed]: Original. No. 1636. U. S. District Court, Ninth District, Southern District of California, Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Bond. Filed Feb. 17, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502–4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [71]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

Clerk's Office.

C. C. No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY.

Praecipe [for Transcript of Record].

To the Clerk of said Court:

Sir: Please issue a certified copy of the Record in the above-entitled case, consisting of:

The judgment-roll;

Stipulation that defendant's answer stand as answer to amended complaint:

Bill of exceptions;

Petition for writ of error;

Assignment of errors;

Order staying proceedings;

Order allowing writ of error; and

Bond on writ of error.

said record to be certified under the hand of the clerk and the seal of the Court.

PENNEL CHERRINGTON,
Attorney for Defendant.

[Endorsed]: C. C. No. 1636. U. S. District Court, Southern District of California, Southern Division. Martini Davide, Plaintiff, vs. San Pedro, Los An-

geles & Salt Lake Railroad Company, Defendant. Praecipe for Certified Copy of Record. Filed Mar. 26, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [72]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

C. C. No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing Seventy-two typewritten pages, numbered from 1 to 72, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the pleadings and of all papers and proceedings upon which the judgment was made and entered in said cause and also of the Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Staying Proceedings, Order Allowing Writ of Error, and Bond on Writ of Error, in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the

praecipe filed in [73] my office on behalf of the defendant by its attorneys of record.

I do further certify that the cost of the foregoing record is $33.55, the amount whereof has been paid me by the San Pedro, Los Angeles and Salt Lake Railroad Company, a corporation, the defendant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 2d day of April, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-seventh.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States of America, in and for the Southern District of California. [74]

[Endorsed]: No. 2266. United States Circuit Court of Appeals for the Ninth Circuit. San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, Plaintiff in Error, vs. Martini Davide, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed April 11, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Allowing Thirty Days' Additional Time in Which to File and Docket Transcript.]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1636.

MARTINI DAVIDE,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a Corporation,

Defendant.

Good cause appearing therefor, it is hereby ordered: That the defendant above named may have thirty days' time in addition to that allowed by law and the rules of the Court, in which to file and docket its transcript on appeal in the United States Circuit Court of Appeals.

Dated March 11th, 1913.

OLIN WELLBORN,

United States District Judge for the Southern District of California, Southern Division.

[Endorsed]: Original. No. 1636. U. S. District Court, Ninth District, Southern District of California. Martini Davide, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Order Extending Time. Received copy of the within order this 11 day of March, 1913. Harris & Swanwick, Burt Chellis, C. E. Donnelly, Jr., Solicitors for ———.

No. 2266. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time Thirty Days to File Record Thereof and to Docket Case. Filed Mar. 12, 1913. F. D. Monckton, Clerk. Re-filed Apr. 11, 1913. F. D. Monckton, Clerk.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, *Plaintiff in Error,* *v.* **Martini Davide,** *Defendant in Error.*	

BRIEF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This action was brought by the defendant in error, plaintiff below, hereinafter styled plaintiff, to recover from the plaintiff in error, defendant below, hereinafter styled defendant, the sum of $10,000.00, for the loss of his left hand resulting from an injury sustained as hereinafter set forth.

On the 25th day of April, 1911, the plaintiff was employed by the defendant in ballasting the track of the main line of defendant between the stations of Las

Vegas and Caliente, in the state of Nevada, the latter station being east of the former. There were about eighty men employed on this work with the plaintiff. On the day in question the men quit work about five o'clock in the evening, and were proceeding easterly to their camp on hand cars, of which there were seven or eight. The plaintiff with five or six other men was riding on the third car from the front, and with his back to the car ahead of him. The cars were going at a speed of from nine to ten miles an hour. When the car on which plaintiff was riding was about thirty feet from that ahead of it, the forward car slowed down, as the men on it were tired out and could not go any faster, the only power used being that of hand power, by which the cars were being pumped along. When the car preceding it slowed down, the car on which plaintiff was riding collided with it, the result being that the car immediately behind the car on which plaintiff was riding collided with it, throwing plaintiff off in front of the car on which he had been riding, which ran over his left wrist and injured it to such an extent that the left hand had to be amputated.

The plaintiff's cause of action is founded upon the Federal Employers' Liability Act of April 22nd, 1908, as amended April 5th, 1910. U. S. Compiled Statutes 1901, Supplement for 1911, page 1322.

The plaintiff alleged in his second amended complaint that the defendant at the time of his injuries was engaged in commerce as a common carrier between the states of California and Utah, and through the state of Nevada; that at the time of his accident he was em-

ployed as a section hand, engaged in repairing the main line track of the defendant in the state of Nevada; that at the time of his injuries he was riding upon and assisting in propelling a hand car, which was owned, operated and used by the defendant in connection with the work on which plaintiff was engaged; that while so engaged in riding upon and assisting in propelling said hand car between Las Vegas and Caliente, in the state of Nevada, the car in front of that on which plaintiff was riding, which was also owned, operated and used by defendant in repairing of its main line, was being propelled at a high rate of speed in advance of that on which plaintiff was riding, the speed of which forward car was suddenly materially slackened, a fact of which the plaintiff had no knowledge at the time, by reason whereof the car on which plaintiff was riding collided with great force against the forward car, and therefore, another car coming from behind collided with the rear of the car on which plaintiff was riding, throwing him to the ground, because of which the car on which plaintiff had been riding ran over and mangled his left hand. The negligence upon which plaintiff relied in his second amended complaint was that of the employees of defendant propelling the car in front of the one on which plaintiff was riding, suddenly slowing it down, and that of the employees of defendant who were following the car on which plaintiff was riding. It was alleged that the crews of both cars operated them in a careless and negligent manner, in slackening the speed of the one and in permitting the other to collide with the car on which the plaintiff was riding. The foregoing, though briefly stated, is the substance of the complaint.

The defendant's answer consists of a specific denial of all the allegations of the complaint other than that of its corporate existence, and especially denies that the car on which the plaintiff was riding was being used and operated, or used or operated, in connection with the care or maintenance of its main line of track, and further specially denies that the plaintiff, when injured, was engaged in work required of him by defendant. Affirmatively the answer alleges that the plaintiff's injuries resulted from his own contributory negligence. The defendant also plead affirmatively that whatever injury the plaintiff suffered was one of the risks which he assumed in the course of his employment.

In the fourth paragraph of its answer the defendant alleges that at the time of his injuries plaintiff was not employed or engaged in any act of interstate commerce, and further alleges that at said time neither the plaintiff nor defendant were engaged in interstate commerce, but that the plaintiff was riding upon a hand car between Las Vegas and Caliente, in the state of Nevada; that neither that hand car nor the others being used at the same time and place were engaged in carrying interstate commerce, nor in doing any act of interstate commerce, but were employed in the state of Nevada only, and that plaintiff at such time was not engaged in any act of commerce at all, either interstate or intrastate.

The answer further contains certain allegations to the effect that plaintiff was engaged in play as he was riding upon the hand car, in jumping from one car to another, by reason whereof he fell between the cars, but it is not necessary to go into those allegations here,

inasmuch as the evidence concerning the same was conflicting and the verdict of the jury against the defendant is decisive on that question.

Shorn of technical phraseology and unnecessary matter, the foregoing constitutes a full and fair statement of the issues on which the case was tried.

The facts stated in the second paragraph hereof contain the substance of plaintiff's evidence, stated most favorably to him. It is therefore deemed unnecessary to burden the record and take up the court's time with a further repetition of them. The defendant's evidence conflicted therewith, but as nothing is claimed for it on this appeal, it is omitted herefrom.

At the close of the plaintiff's case the defendant moved the court for a judgment of non-suit on the ground of the insufficiency of the evidence to support any judgment against it, which motion was by the court denied. At the conclusion of the evidence, and before the court instructed the jury, the defendant requested the court to direct a verdict in defendant's favor, on the ground of the insufficiency of the evidence to show any negligence on its part, which request was refused by the court. The defendant also separately requested the court to instruct the jury to find a verdict in its favor on the ground that at the time of the accident neither the plaintiff nor defendant was engaged in any act of interstate commerce, which request was refused by the court. Thereafter, after having been instructed as to the law of the case by the court, the jury returned a verdict in favor of the plaintiff in the sum of $2,750.00.

It will thus be seen that but two questions are involved in this appeal:

1. Did the evidence show any negligence on the part of the defendant, and,

2. Were the plaintiff and defendant engaged in any act of interstate commerce at the time of the accident?

II.

Assignments of Error by Plaintiff in Error.

1. The court erred in overruling the defendant's motion for a judgment of non-suit.

2. The court erred in refusing to instruct the jury to return a verdict in favor of the defendant because of the insufficiency of the evidence to show negligence on the part of the defendant, as set forth in exception No. 1 of the bill of exceptions.

3. The court erred in refusing to instruct the jury to find a verdict in favor of the defendant on the ground that neither the plaintiff nor defendant, at the time of the accident, was engaged in interstate commerce, as set forth in exception No. 2 of the bill of exceptions.

III.

ARGUMENT.

First.

The plaintiff in error contends that the court erred in denying its motion for a non-suit, and again erred in refusing to instruct the jury to return a verdict in its favor on the ground of the insufficiency of the evidence to show any negligence on the part of the defendant below. [Trans. pp. 44 and 49.] Both involve the

same question, both are based on the same facts, and the same law is applicable to them.

It must be borne in mind that the negligence complained of was that of slowing down of the car in front of plaintiff and permitting the one behind him to collide with the car on which he was riding. [Trans. p. 31.] The evidence is that as the forward car came through a tunnel, it was running quite fast, but as it came out it slowed down. [Trans. p. 42.] It slowed down as it came out of the tunnel because the men were tired out. As the witness Medrano put it—"We didn't have enough power," the only power being hand power. [Trans. p. 43.]

Again, according to the witness Reyes, the forward car was running slow because when it came out of the tunnel the men were tired, and when it came out of the tunnel it was only thirty feet ahead of the plaintiff's car. [Trans. p. 44.] Plaintiff himself simply testified that the accident happened, and as to the result, but did not know any of the details. [Trans. p. 41.]

This, in effect, was all the evidence in the case, except that on the part of the defendant, for which nothing is claimed on this appeal.

The question arises: Does this evidence show that the things alleged by the plaintiff, and the things that happened, constitute negligence on the part of the defendant? It is elementary that the plaintiff must recover upon the allegations of his complaint, that he must recover because of the negligence alleged by him. No claim is made of any other negligence, and if any such claim were made it could avail plaintiff nothing.

We submit that it is not shown that plaintiff's injury was the result of negligence, but must be considered as an accident.

Plaintiff must introduce specific testimony fairly tending to show negligence of the defendant.

Labatt's Master and Servant, Second Ed., Section 1602.

And this principle is controlling, even in cases where the circumstances of the accident strongly suggest the conclusion that defendant has been negligent (as they certainly do not in the case at bar).

Ibid., sec. 1600.

Where the plaintiff's evidence is equally consistent with the absence of negligence as with its existence, no action can be maintained.

Ibid., sec. 1602.

"If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court."

Herbert v. So. Pac. Co., 121 Cal. 229.

"When the negligence of the defendant is the basis of the plaintiff's right of recovery, it is the province of the judge to determine whether the evidence submitted by the plaintiff has any legal tendency to establish negligence, and it is for the jury to determine whether it is sufficient therefor. *If there is no evidence from which a jury would have the right to infer negligence, the judge may withdraw the case from them.*" (Italics are ours.)

McCurrie v. So. Pac. Co., 122 Cal. 558.

Such is the law concerning recoveries in such cases in the state of California, and in the absence of evidence to the contrary, this is presumed to be the law in the state where the accident happened.

16 Cyc., p. 1084;

Harrington v. Union Trust Co., 140 Cal. 244.

As a matter of fact, however, it can be confidently asserted that there is no decision in the state of Nevada contradictory to the principle expressed in the California decisions. Therefore, the California decisions, in the absence of prior decisions by the federal courts to the contrary, would be binding upon the federal courts.

Fed. Stats. Ann., Vol. 4, p. 517, sec. 721.

However, the principles asserted by the California Supreme Court and the federal courts are harmonious.

In C. & N. W. Ry. v. O'Brien, 132 Fed. Rep. 593, the Circuit Court of Appeals for the Eighth Circuit said:

"* * * But however this may be, it is obvious that it was of great importance to the railway company that the jury be instructed that the fact of the derailment of the train did not in itself raise a presumption of negligence for which it was chargeable. * * * It is familiar doctrine that in cases between employee and employer, the law does not presume carelessness or negligence on the part of the latter."

See also

Shandrew v. C. St. P. M. & O. Ry., 142 Fed. Rep. 320;

McDonnell v. Oceanic Navigation Co., 143 Fed. Rep. 480.

And such is the law as laid down by the Supreme Court of the United States in Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658 (Law Ed., Book 45, p. 361), wherein it is said:

"* * * While in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely * * * a different rule applies as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. * * * That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony."

It seems certain and beyond contradiction that the foregoing authorities state the rule of law governing this case, and necessitate a reversal of the judgment herein.

Of course, an employer is liable in damages for its negligence by which its servant suffers injury. Yet the employee must in his pleading specify the particular act or acts of negligence upon which he bases his claim to a recovery; he cannot, as can a passenger, plead the relation, the happening of the event, and the resulting injuries, and then recover upon proof of these allegations alone, even though his proof be uncontroverted. The employee in this case has specified only two alleged acts of negligence, that of the sudden lessening of speed of the car immediately preceding the one upon which he was riding, and that of the car behind the one upon which he was riding colliding with it. As a matter of fact, the plaintiff, by his own witnesses, has explained the lessening of the speed of the first car, and affirmatively disproven any negligence. As his own witnesses testify, the car slowed up because those propelling it were tired and could not go faster. [Trans. pp. 43-4.]

Why the car behind the one on which plaintiff was riding ran into it is unexplained by the evidence, and under the authorities quoted herein, the defendant cannot be found guilty of negligence without some explanation of the happening of the event affirmatively appearing from the evidence. As it is, that cause is shrouded in mystery and left only to conjecture; negligence of a master as against a servant cannot be predicated upon mere conjecture. If, however, conjecture were per-

missible, it seems that the only plausible conjecture is that the colliding of the rear car with that on which the plaintiff was riding was an accident pure and simple, resulting from the slackening of speed of the car preceding that upon which the plaintiff was riding, and that act, as has been above stated, was affirmatively proven not to have been the result of negligence.

Therefore, we confidently submit:

1. That the honorable trial court should have granted the defendant's motion for a non-suit, and,

2. That it should have instructed the jury as requested by the defendant in its request for instruction No. 1, and that the judgment in this case should be reversed because of its refusal to do each and both.

SECOND.

Further than this, assuming, though by no means admitting, that by some stretch of imagination the evidence in this case could be held to have proven negligence on the part of the defendant, yet the judgment should be reversed because the plaintiff's action, as hereinbefore stated, was founded upon the Federal Employers' Liability Act, and he must succeed or fail thereunder. We submit with considerable assurance that the plaintiff's evidence does not bring him within the protection of that act. Without doubt, under the decisions of the federal courts, which it is not necessary to here cite, the defendant railroad company was engaging in interstate commerce, but we think it is equally clear that the plaintiff was not so engaging at the time of his injury.

It is true that under the decision of the Supreme Court of the United States in the case of Pedersen v. D. L. & W. Ry. Co., reported at page 648 Advance Sheets of the Supreme Court Reports, under date of July 1st, 1913, the plaintiff, while ballasting the main track of defendant during the day, was engaged in an act of interstate commerce, but we do not think it can be said that he was so engaged after he quit work and started to camp, as testified to by him and all the other witnesses.

Plaintiff in error is compelled to submit this phase of the case upon principle rather than upon direct and positive authority. But we think that what has been said in some of the federal cases upon this subject is directly pertinent to and coincident with plaintiff in error's position on this question. As said, we know of no case directly decisive of our contention one way or the other, so that reference to but a few of the decided cases will be all that will serve any good purpose here.

We have no fault to find with the case of Central Railroad of N. J. v. Colasurdo, decided by the Circuit Court of Appeals for the Second Circuit, December 11th, 1911, and reported in 192 Fed. Rep., page 901. In that case the plaintiff was clearly engaged in an act of interstate commerce, in that he was repairing a switch, which was an instrumentality used in connection with the defendant's interstate commerce business, and the repair of which was necessary to the despatch and safety of its interstate commerce trains. What the court would have there decided had Colasurdo finished his work of repair and been proceeding to his home

after his hours of labor were over, the decision does not say.

As we understand it, the test as to whether or not plaintiff was engaged in interstate commerce at the time of his injury, lies in the answer to the question whether, at the time and place of his injury, such injury had, or was susceptible of having, any influence upon interstate commerce. If it did not, he was not engaging in interestate commerce, as we understand it.

"* * * As indicated in the opinion, the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, What is its effect upon interstate commerce? Does it have the effect to hinder, delay or interfere with such commerce? * * * Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce?"

Lamphere v. O. R. & N. Co., 196 Fed. Rep. 336.

The above case was decided by this Honorable Court on May 6th, 1912. In that case the necessary answers to the questions quoted necessitated a reversal of a judgment in favor of the defendant railroad company and a holding that Lamphere was engaged in interstate commerce. But Lamphere had not ceased his day's labor and started for home. He was then under orders of the railroad company on his way to take up his duties in connection with an interstate train, and any injury to him while so doing necessarily operated to

hinder, delay and interfere with interstate commerce as carried on by the train which he was being sent out to meet.

In the case at bar, after plaintiff's labors were over, an injury to him could have no possible effect upon interstate commerce. His injury could neither hinder nor delay, nor interfere with it; his personal safety could not accelerate it. When he ceased work on the track and started home, his duties, so far as any act of interstate commerce is concerned, were just exactly the same as if he had stayed at the place of work over night, or as if he had proceeded to his home at a place in a direction directly opposite from that in which the hand cars were proceeding. As far as the defendant railroad company was concerned, and as far as interstate commerce was concerned, it mattered not whether the plaintiff went into camp with the other men, whether he went to some other place, or whether he quit the service of the company entirely at the close of the day's work. In fact, at the time and place of his injury, it had no more effect on interstate commerce than had he resigned his position during the afternoon and had been at the time transported as an act of accommodation to Caliente, under which circumstances it certainly could not have been said that he was engaging in interstate commerce.

The question is not whether, for some purpose or other, the relation of master and servant still existed between him and the plaintiff in error, but whether or not the act in which he was then engaging, and his injury, or either of them, affected the defendant's inter-

state commerce business one way or the other, and we submit that it did not, and could not. Therefore, his case is not within the purview or intent of the act.

In the Pedersen case, *supra,* the Supreme Court said: "* * * And so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

Naturally, the Supreme Court answered its own questions in the affirmative, because there Pedersen was actively engaged in the preparation of work connected with the repair of a bridge which was an instrumentality used in interstate commerce, and which it was the duty of the defendant company to keep in repair, and, of course, it was as much a duty to bring the materials necessary in the repair work on or to the bridge as to do the repairing itself. The "duty resting upon the carrier" being evidently a duty instrumental in the railroad company's interstate transportation. When Pedersen was injured on his way to the bridge with materials, he certainly was performing a duty for the defendant incumbent upon it in connection with and for the betterment of its interstate transportation facilities.

Obviously not so in the case at bar, because the plaintiff's going to camp after his day's work was over, had not, and could not have, any effect to facilitate or delay the business of the railroad company as an interstate carrier. That business would have gone on as well had plaintiff gone to his home in some other direction, or had he preferred for his own convenience to spend the night at the place of work, or had he for any one of a dozen reasons deserted his job at the end of the day.

So far as we have been able to ascertain, the question here involved has not been passed upon; hence our failure to cite any direct authority for the guidance of the court. However, bearing in mind the purposes of the act in question, it seems quite clear upon principle that the plaintiff Davide was not engaged in any act of interstate commerce as contemplated by the Employers' Liability Act, because of which, we earnestly assert that the trial court erred in refusing to instruct the jury as requested by the defendant in its request for instructions No. 2, for which further error the judgment herein should be reversed.

Respectfully submitted,

A. S. Halsted,
Pennel Cherrington,
Attorneys for Plaintiff in Error.

No. 2266.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation,
Plaintiff in Error,
vs.
Martini Davide,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

On the 25th day of April, 1911, defendant in error, hereafter referred to as plaintiff, was in the employ of plaintiff in error, hereafter referred to as defendant, in the capacity of section hand near Caliente in the state of Nevada. Upon that date plaintiff sustained injuries resulting in the amputation of his left hand.

The second amended complaint alleges [fols. 32-33] that on the day in question plaintiff was engaged in the repair of the main line track of defendant and that

acting under the directions of defendant's section foreman he was riding upon and assisting in propelling a hand-car used in connection with his work; that plaintiff was injured by reason of the negligence of other employees of defendant who materially slackened the speed of a hand-car which had been proceeding rapidly along said main line track in advance of plaintiff's car, resulting in a collision of the two cars, and by reason of the negligence of other employees of defendant in allowing a third hand-car which had been proceeding along said track in the rear of plaintiff's car to run into and collide with plaintiff's car.

The evidence shows [fols. 42-43] that at the date of the plaintiff's injury he was one of a gang of fifty or sixty men working for defendant ballasting the main line track in Nevada; that at about five o'clock on the night in question the gang started back to camp on seven hand-cars; that the section boss directed plaintiff to go on the third hand-car from the front and drive it back to camp [fol. 43]; that plaintiff was pumping on his hand-car with his back to the car preceding his; that his car was going along pretty fast; that the car preceding plaintiff's car was traveling quite fast just before the accident [fol. 43]; that all the cars were going as fast as they could pump, between nine and ten miles an hour [fol. 47]; that the car preceding plaintiff's car was going fast when half-way through the tunnel, but that when it was coming out of the tunnel the men pumping it were tired and slackened speed and came out of the tunnel slowly; at this point plaintiff's car, following rapidly, collided with it, plain-

tiff not knowing that the speed of the forward car had been slackened [fol. 43], and then the car following plaintiff's car collided with his car; that by these collisions plaintiff was injured, plaintiff's testimony being that he was thrown and injured by the collision of his car with the car preceding his [fol. 42].

ARGUMENT.

Plaintiff contends that the evidence shows:

I.

That the injuries sustained by plaintiff were the direct result of defendant's negligence as charged in the second amended complaint;

II.

That plaintiff and defendant were engaged in interstate commerce at the time of the negligent acts complained of.

I.

Medrano and Reyes, two of the men on the car preceding plaintiff's car, practically admitted their negligence when by their testimony they showed that with knowledge of the fact that cars following them were traveling fast, and that plaintiff was riding with his back towards their car so that he could not see what they did; they maintained their high rate of speed until half-way through the tunnel and then, without any warning, and merely because they were tired, and without regard for the consequences which would necessarily follow, slowed up coming out of the tunnel [fols.

43 and 45], and even then made no attempt to avoid an accident, when, as Reyes testified [fol. 45], plaintiff's car was seen coming thirty feet away.

Plaintiff occupying the position assigned to him to pump his hand-car, with his back to the car preceding his, had no means of knowing what was transpiring on the forward cars, and he had a right, therefore, to rely on the speed of the forward cars being maintained sufficiently to avoid a collision with his car running at the speed maintained by all the cars before the collision, and it was the duty of the men on the forward car to have maintained their speed or given warning to the cars following that they intended to stop. The collision happened without the intervention of any outside agency, and the circumstances as detailed by the witnesses clearly show that the same would not have occurred had the forward car maintained its speed along the track instead of stopping as it was emerging from the tunnel.

Defendant in its brief lays much stress upon the proposition that the mere happening of an accident is not of itself evidence of negligence. This we readily concede, and the lower court so instructed the jury [fol. 54].

Where a number of hand-cars are running on the same track a prudent regard for the safety of the persons on the cars would seem to require that a reasonable space should be maintained between them in order to avoid collision, and that the failure to maintain such space would constitute negligence. This view is supported by the testimony of the defendant's section fore-

man as a witness on the part of the defendant where he states:

"I always instructed the men to run the cars not closer than 300 feet" [fol. 46].

It is evident that the jury believed that both collisions occurred on account of the fact that the persons operating the hand-cars failed to maintain a sufficient space between them, or in other words, that they were negligent in not maintaining a sufficient space between the cars.

Defendant admits that the cause of the collision was the slackening of the speed of the car preceding the one upon which plaintiff was riding, but contends that it affirmatively appears that such slackening of speed was not the result of negligence (defendant's brief, p. 14). We do not agree with defendant's contention that it affirmatively appears that the slackening of speed was not the result of negligence. If the cars had been run in a careful and prudent manner with a sufficient space between them, no injurious results would have followed from the slackening of speed.

Defendant contends that the cause of plaintiff's injury was an accident pure and simple, its position being that an accident occurred independent of any act done or omitted by any of defendant's employees. If that contention be true, we may admit its conclusion. If, for instance, the car upon which plaintiff was riding had been in good condition, being properly propelled upon a track in good condition, and had been blown from that track by a hurricane, we admit that no liability on the part of defendant would have been shown,

but where the collision was caused, as is shown by the evidence, by the slackening of the speed of the car preceding the one upon which plaintiff was riding, we submit that the question as to whether the slackening of that speed or the failure to maintain a reasonable distance between the different cars constituted negligence was a question to be determined by the jury. The speed of the car preceding the one upon which plaintiff was riding was slackened; a double collision occurred; the car upon which plaintiff was riding collided with the car preceding it and the car following the car upon which plaintiff was riding also collided. Someone was negligent in failing to maintain a proper distance between the cars. Either the crew upon the first car was negligent in slackening the speed or the crew of the last car was negligent in not slackening their speed or in not maintaining a sufficient distance between their cars and the one upon which plaintiff was riding. The accident occurred as the result of a combination of these various elements of negligence and not from something over which the employees of defendant had no control.

The contentions of the plaintiff and defendant on the question of negligence, as shown by the pleadings and evidence, may be briefly stated as follows, viz.:

By plaintiff—the cars preceding and following the one on which plaintiff was riding were negligently operated, resulting in the collision which caused plaintiff's injury;

By defendant—plaintiff was engaged in playing in

jumping from one car to another, by reason whereof he fell between the cars.

Defendant in its brief seeks to eliminate the theory upon which it tried the case by admitting that the verdict of the jury against it is conclusive—but the fact remains that both by its pleadings [fol. 23] and evidence [fols. 46-48] it relied upon the defense that the plaintiff was engaged in play and jumped from one car to another.

The contentions of the respective parties in regard to the cause of the collision were submitted to the jury under appropriate instructions in which the law defining negligence was correctly stated. The jury adopted plaintiff's view of the case and returned a verdict accordingly. The evidence was conflicting and the verdict should be sustained.

Defendant in its brief says:

"Negligence of a master as against a servant cannot be predicated upon mere conjecture" (page 13).

Upon this point and upon the general question of the province of the jury in the determination of the question as to whether or not negligence may be inferred from circumstances, we desire to call attention to the recent case of Perkins v. Northern Pac. Ry. Co., 199 Federal 712, decided by this court in October, 1912. The court there says (p. 719):

> "That the cause of an accident may be inferred from circumstances does not admit of doubt."

The court then calls attention to various circumstances from which the cause of the accident might be

inferred, and quotes from Railroad Co. v. Stout, 17 Wall. 657, 664 (21 L. Ed. 745), as follows:

> "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, those sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that 12 men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

II.

The second point treated by defendant in its brief is its contention that although plaintiff while ballasting the main track of defendant during the day was engaged in interstate commerce, he was not so engaged after he had quit work and started to camp. (Defendant's brief, p. 15.) Defendant's position on this point, as stated in its brief (p. 17), is that as far as interstate commerce was concerned and as far as the defendant railroad company was concerned, it mattered not whether the plaintiff went into camp with the other men, whether he went to some other place or whether

he quit the service of the company entirely at the close of the day's work.

Plaintiff had not entirely ceased his day's labor at the time of the accident. The seven or eight hand-cars which the men used in connection with their work could not be left standing on a main line track over night, and plaintiff, himself, testified:

"The boss sent me on that hand-car to drive it back to camp" [fol. 43];

and O'Brien, the section foreman, a witness on behalf of defendant, testified:

"Before the accident I instructed the men where to put the cars on the track." [fol. 46].

This court in the case of Lamphere v. Oregon R. & Nav. Co., 196 Federal 336, at page 337 *et seq.*, said:

> "There are decisions which hold that an employee of a railroad company while going to and from his work is not engaged in the service of his employer, and is not the fellow servant of other employees of the same master, but there are cases holding to the contrary, and, whatever may be the conflict of authority as to the ordinary case of an employee going to and from his work, there can be no question that he is in the service of his master, and is a fellow servant of his co-employees whenever he is doing that which under his contract of employment he is bound to do (citing cases). The deceased when he was killed, was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to-wit, to move a train then engaged in interstate commerce."

And in the same case this court quotes with approval from Behrens v. Illinois Central R. Co. (D. C.), 192 Fed. 581, as follows:

> "I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixed his status and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, it is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employee himself has no control over his own actions, and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

The case of Stone-Webster Engineering Corporation v. Collins, 199 Federal 581, decided by this court, is directly in point. This court in that case says (page 586):

> "Another question presented is whether the plaintiff at the time of the accident was acting within the scope of his employment, so as to render the defendant liable for his injury. It is urged that the relation of master and servant had ceased to exist, plaintiff having quit work for the night, and that the risk of injury attending his further movements was his own, and not that of the company. Perhaps ordinarily such would be the case. There is evidence here, however, tending to show that the men were permitted to ride in on the engine and cars from their work in going to their camp. * * * If at this juncture the relation of master and servant had ceased to exist, though there is authority to the contrary (citing case), the defendant was still under obligation to observe reasonable care for the protection of the plaintiff while on his way to camp."

It is true that defendant could have elected to set the hand-cars to one side, away from the track, and allowed the men to choose their own means of getting to camp. Plaintiff had no such choice. To expedite the repair of its main line track defendant provided these cars as a means of transporting the men back and forth [fol. 46], and made it a part of plaintiff's duty to return his car to camp as soon as the repair work for the day was over. That the transferring of these men back and forth on the hand-cars expedited the work of repairing the main line track must be inferred from the fact that the company made it a practice to provide the cars and direct the men to use them, and that it was not a departure from the custom of the company is shown by the testimony of the section foreman:

"I used seven or eight cars, sometimes nine, in transferring the men back and forth" [fol. 46].

Respectfully submitted,

HARRIS & SWANWICK,

BURT CHELLIS,

CHAS. E. DONNELLY, JR.

Attorneys for Defendant in Error.